



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Tess W.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2020003516

Hearing No. 430-2019-00209X

Agency No. 200I-0544-2018104154

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the decision of an EEOC Administrative Judge (AJ) concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a Medical Instrument Technician in Columbia, South Carolina.

On May 15, 2018, Complainant contacted an EEO counselor and filed a formal EEO complaint on August 27, 2018, alleging that the Agency discriminated against her on the bases of sex (female),² disability (ADHD, Anxiety Disorder, and Sleep Disorder), and in reprisal for prior

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

² While Complainant did not raise the basis of sex on her formal complaint, she did raise it as a basis in her affidavit during the investigation. Report of Investigation (ROI) at 83.

protected EEO activity (requesting a reasonable accommodation). By letter dated October 10, 2018, the Agency accepted the formal complaint for investigation and determined that the formal complaint was comprised of the following claims:

- A. on April 16, 2018, Complainant was issued a written counseling;
- B. on May 11, 2018, Complainant's Family & Medical Leave Act (FMLA) request was denied;
- C. on May 11, 2018, Complainant was provided with an inadequate reasonable accommodation;
- D. on May 11, 2018 and on May 15, 2018, Complainant was assigned to a different work area;
- E. on August 24, 2018, Complainant was issued a written counseling;
- F. on August 27, 2018, Complainant was denied a reasonable accommodation; and
- G. On September 19, 2018, Complainant was denied FMLA.³

After an investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). On October 18, 2019, the Agency filed a Motion for a Decision Without a Hearing (Motion). Therein, the Agency found that under a disparate treatment analysis, Complainant's initial FMLA request was denied for a legitimate, nondiscriminatory reason. Specifically, the Agency asserted that her request for leave for doctor's appointments could be managed during her scheduled days off. The Agency further found that each time Complainant made a request for an accommodation, the Agency provided an interim accommodation and subsequently provided a permanent accommodation upon receiving additional medical documentation.

On April 14, 2020, the AJ issued a decision by summary judgment finding no discrimination and adopting the Agency's Motion in its entirety. The AJ further found that claims (B) and (G) should be dismissed for failure to state a claim reasoning that these matters were a collateral attack on the FMLA process.

The record is devoid of evidence that the Agency issued a final order. Thus, the AJ's decision became the Agency's final order. See 29 C.F.R. § 1614.109(i).

The instant appeal followed. Complainant requests that we review all claims.

In response, the Agency requests that we affirm the AJ's decision. The Agency reasons that Complainant has not met the criteria for a "request for reconsideration."⁴

³ Claims (E)-(F) were accepted as amendments to the initial formal complaint.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (explaining that the *de novo* standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

After a careful review of the record, we find that this matter warrants further development of the record and possible credibility determinations. The hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e).

⁴ While the Agency sets forth the criteria for a request for reconsideration in its response brief, we note that this is an initial appeal and *not* a request for reconsideration of an appellate decision.

“Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims.” Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995).

During the investigation, in connection with claim (D) of her complaint, Complainant raised the issue that she was subjected to unwanted sexual comments from a patient at the facility when the Agency assigned her to work outside of her regular department (Hemodialysis). Specifically, Complainant asserted she was assigned as a “floater” in different units from May 17, 2018 through August 22, 2018. ROI at 85. In her affidavit, Complainant stated, “[s]ome days I had to sit with patients that made me feel uneasy and made inappropriate comments to me. I also advised [my immediate supervisor, (S1)] about the patient as well as charted the comments in the patient’s chart. I notified [S1] about the patient’s inappropriate comments. I am a [military sexual trauma] victim. Each time I sat with this patient, and he described my rear end, it made me feel worthless.” Report of Investigation (ROI) at 85.

Complainant again raised the issue that she was subjected to sexual comments by a patient, during the time she was assigned outside of her regular work area, in her deposition when this matter was at the hearing stage. During her deposition, Complainant stated that she was “harassed” about how she looked, what she was wearing, the size of her “butt” and how pretty her face was. Complainant’s Deposition (CP’s Dep.) (Aug. 6, 2019) at 19. Complainant asserted that she continued to be assigned to the patient at issue many times even after she notified management of the patient’s inappropriate comments and that the patient continued to make these comments. Complainant’s Deposition (CP’s Dep.) (Aug. 6, 2019) at 49-50.

An Agency must take reasonable care to protect its employees from discriminatory harassment. Pursuant to 29 C.F.R. § 1604.11(e), an agency may be held liable for the acts of non-employees, if the Agency know or should have known of the conduct and fails to take immediate and appropriate corrective action.

Complainant raised the issue of being subjected to sexual harassment by a patient, during the investigation, and this matter was like or related to her claim that she was assigned work outside of her designated department. The record, however, is devoid of evidence that the Complainant was advised by the EEO Investigator of the process to request to amend this issue to her current complaint. At any time prior to the agency's mailing of the notice required by 29 C.F.R. § 1614.108(f) at the conclusion of the investigation, 29 C.F.R. § 1614.106(d) permits a complainant to amend a pending EEO complaint to add claims that are like or related to those claims raised in the pending complaint. See EEO MD-110, at Ch. 5, § III.B. If a complainant raises a new claim with an EEO Investigator, the EEO Investigator should instruct her to submit a letter to the agency's EEO Director or Complaints Manager describing the new claim and stating that she wishes to amend her formal complaint to include the new claim. See *id.* Once the agency is aware that a complainant is raising a new like or related claim, the agency is required to amend the complaint, acknowledge the amendment in writing, and notify the EEO Investigator to include the new claim in the investigation. See EEO MD-110, at Ch. 5, § III.B.2.

Additionally, the Agency did not address this issue in its Motion and the AJ did not address it in her decision. Based on the foregoing, we find that this claim warrants further development and Complainant is entitled to have this claim adjudicated by an AJ.

In light of our remand of Complainant's sexual harassment claim, we decline to fragment the complaint by separately addressing the related remaining claims on the merits. However, we nevertheless determine that the AJ properly found that claims (B) and (G), to the extent Complainant alleged that the Agency did not properly follow FMLA regulations in processing her FMLA request, should be dismissed on procedural grounds for failure to state a claim as a collateral attack on the FMLA process. Nevertheless, we find that Complainant was also requesting leave as a reasonable accommodation (rather than solely as an FMLA request). The Commission has held that requests for paid or unpaid disability-related leave can constitute requests for a reasonable accommodation. See Corbett v. Gen. Serv. Admn., EEOC Petition No. 03A10017 (Apr. 12, 2001). The Commission has held that an Agency violates the Rehabilitation Act to discipline an employee for work missed during leave taken as a reasonable accommodation. See Roscoe v. Dep't of the Navy, EEOC Appeal No. 01974138 (Sept. 21, 2000).

In the instant matter, Complainant's FMLA paperwork specifically sets forth that the leave requested was for medical appointments related to various medical conditions. ROI at 227, 240. In addition, Complainant, in her affidavit, asserted, "I have medical conditions that require me to miss work at times and attend appointments and counseling. I have serious health issues that sometimes prevent me from reporting to work." ROI at 84. Complainant asserts that the Agency issued her written letters of counseling based on these denied absences. (Claims (A) and (E)) Thus, on remand the AJ should also address the issue of Complainant's leave as a denial of a reasonable accommodation claim.

Accordingly, we AFFIRM the AJ's decision dismissing claims (B) and (G) for failure to state a claim to the extent Complainant alleged that the Agency failed to properly follow FMLA regulations. However, as discussed above, we REMAND the remainder of the complaint (including Complainant's claim that she was subjected to sexual harassment by a patient at the facility) for a hearing in accordance with the ORDER below.

ORDER

The Agency is directed to submit a copy of the complaint file to the Hearings Unit of the EEOC Charlotte District Office within fifteen (15) calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition.

See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the [EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx](https://publicportal.eeoc.gov/Portal/Login.aspx)

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs.

Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

December 22, 2021

Date